UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

No. 15CR287-LTS

-against-

SEAN STEWART,

Defendants.
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MEMORANDUM ORDER

The Government moves to compel (1) former J.P. Morgan Chase & Co. ("J.P. Morgan") in-house attorney Ryan Hickey ("Hickey") to give testimony and produce documents concerning communications Defendant made to her during a Financial Industry Regulatory Authority ("FINRA") inquiry into trading in the stock of Kendle International, Inc. ("Kendle") and (2) J.P. Morgan to produce documents concerning communications Defendant made to J.P. Morgan personnel in connection with FINRA's Kendle inquiry.[1] J.P. Morgan has asserted the attorney-client and work product privilege over the testimony and documents.

By way of brief background, J.P. Morgan represented Kendle in the negotiations leading up to a May 4, 2011, announcement by INC Research, LLC that it intended to acquire Kendle. FINRA initiated an inquiry into pre-announcement trading in Kendle securities and, by letter dated July 19, 2011, requested that J.P. Morgan circulate a list of names of people and entities ("FINRA Kendle List") to J.P. Morgan employees involved with the merger negotiations and ask whether the employees recognized any of the names. After circulating the list as requested, in an August 23, 2011, letter, Hickey, then a Vice President and Assistant General Counsel at J.P. Morgan, responded to FINRA that none of the relevant J.P. Morgan employees reported knowing any of the individuals on the FINRA Kendle list. FINRA, after discovering that Robert Stewart, who appeared on the list, was Defendant's father, asked Hickey whether J.P. Morgan's response included an answer from Defendant. Hickey responded that J.P. Morgan's response was complete and did not include a positive response from Defendant. A few days later, on August 26, 2011, Hickey telephoned FINRA and explained that she had spoken to the Defendant and wished to supplement J.P. Morgan's response to reflect that (1) Defendant now acknowledged that his father's name was on the FINRA Kendle List, and (2) Defendant had overlooked that name upon first review. By letter dated August 31, 2011, Hickey supplied this information to FINRA in writing:

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[1] By letter dated July 21, 2016, Defendant joins in the Government's motion to compel.

> As discussed on August 26, 2011, upon further view of the enclosure to FINRA's July 19, 2011 request, Sean Stewart recognized the name of his father, Robert Stewart. Mr. Stewart overlooked his father's name when he first reviewed the enclosure. Mr. Stewart reported that he did not discuss the transaction at issue with his father, and does not know of any circumstances under which knowledge of the company's business activities would have been gained by his father. Mr. Stewart does not live in North Merrick, New York. He lives at [address in Manhattan.] (Ex. E.)

J.P. Morgan has represented that, if called at trial, Hickey will say no more than that Defendant's statements to her were "consistent" with what she already conveyed to FINRA, and asserts that any additional communications between Defendant and Hickey or Hickey's recollections of those communications are covered by J.P. Morgan's attorney-client privilege and/or the attorney work product doctrine. The Government acknowledges that the information it seeks is privileged in the first instance, but argues that "[a]ny privilege that might at one time have covered the defendant's statements to the company counsel was unmistakably waived by disclosures to FINRA" and that other related communications should be considered waived to the extent fairness requires.

The attorney-client privilege applies to communications "(1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." U.S. v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011). The attorney-client privilege applies to communications between in-house counsel and a corporation's employees for the purpose of obtaining legal advice for the company. Upjohn Co v. United States, 449 U.S. 383, 394 (1981). "[W]here a corporate employee provides factual information to an attorney who is conducting an internal investigation for legal purposes, such communications are . . . shielded by the attorney-client privilege." Leber v. Citigroup 401(K) Plan Inv. Comm., No. 07-CV-9329, 2015 WL 6437475, at *3 (S.D.N.Y. Oct. 16, 2015) (citations omitted). It is well established, however, that any voluntary disclosure to a third party of otherwise privileged information constitutes waiver of the privilege. See In re Grand Jury Proceedings, 219 F.3d 175, 184 (2d Cir. 2000).

Although Defendant's communications to Hickey were privileged, J.P. Morgan waived that privilege to the extent it disclosed the substance of the communications to FINRA. J.P. Morgan disclosed that Defendant gave a negative answer in response to the question of whether he recognized anyone on the FINRA Kendle list and disclosed his explanation as to why he did not identify his father on the list. Further, the August 31, 2011, letter specifically represented that "Mr. Stewart reported that he did not discuss the transaction at issue with his father, and does not know of any circumstances under which knowledge of the company's business activities would have been gained by his father." (Ex. E.) In short, J.P. Morgan did not merely disclose unprivileged facts. It disclosed the contents of privileged communications, waiving its attorney-client privilege as to these disclosed communications.

J.P. Morgan's argument that there was no waiver because it was compelled to make the FINRA disclosures lacks legal and factual foundation. Although J.P. Morgan has subjected itself to FINRA's regulatory authority, FINRA is a private self-regulatory organization and J.P. Morgan's disclosures were not compelled by a court or other governmental order, nor was the information seized. See In re Parmalat Sec. Litig., No. 04-MD-1635, 2006 WL 3592936, at *4 (S.D.N.Y. Dec. 1, 2006) (seizure of material by government authority effects involuntary disclosure and is not a waiver). J.P. Morgan could have asserted its privilege and refused to disclose the communications as it seeks to do here.

J.P. Morgan's waiver, however, does not extend to the entire scope of communications Defendant may have had with J.P. Morgan in-house counsel regarding the Kendle deal or the FINRA inquiry. The waiver extends only to the communications by Defendant that were recited or summarized in the August 23, 2011, and August 31, 2011, letters, and in Hickey's August 26, 2011, telephonic communication with FINRA.

The Government asserts that fairness may require disclosure of additional related communications under the doctrine of subject matter waiver. Under Federal Rule of Evidence 502(a), which is not directly applicable to this private disclosure but is instructive here, privileged communications that were not disclosed to a governmental agency may be subject to disclosure if they concerned the same subject matter as the disclosed communications and ought "in fairness" be produced. United States v. Mount Sinai Hospital, No. 13-CV-4735, 2016 WL 2587393, at *4 (S.D.N.Y. May 4, 2016). Such disclosure is only appropriate in "unusual situations." In re General Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 533 (S.D.N.Y. 2015) (citing Fed. R. Evid. 502 Advisory Committee Notes). Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and "depends primarily on the specific context in which the privilege is asserted." See In re Grand Jury Proceedings, 219 F. 3d at 183. The Second Circuit has recognized that "a more limited form of implied waiver may be appropriate where disclosure occurred in a context that did not greatly prejudice the other party in the litigation" - more specifically, such as those made in an extrajudicial context. Id.; see In re von Bulow, 828 F.2d 84, 101 (2d Cir. 1987). J.P. Morgan's disclosure was clearly made outside the judicial context, and was not made to a federal office or agency during the course of an investigation. J.P. Morgan itself is not a party to the instant prosecution and nothing in the record before the Court indicates that J.P. Morgan has tried to use the disclosed material offensively in aid of litigation or in a manner unfair to either of the parties to this criminal proceeding. See General Motors, 80 F. Supp. 3d at 534. Accordingly, the Court finds that there has been no subject matter waiver, and the waiver's scope is limited to the communications already disclosed to FINRA.

With respect to the issue of attorney work product protection, the Government has represented that it does not intend to elicit from Hickey her impressions of Defendant or her views on his credibility. Defendant, in joining the Government's motion, has asserted that, were Hickey to testify, Defendant would be entitled to any notes taken by Hickey during the course of the interview with Defendant. J. P. Morgan claims that Hickey's recollections of her communications with Defendant are work product because they are "intertwined" with her mental impressions of those communications.

As with the attorney-client privilege, waiver of work product protection can occur when a party discloses the substance of attorney work product. See, e.g., Bank of America, N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 168 (S.D.N.Y. 2002) (work product privilege waived with respect to facts and documents underlying a regulatory presentation); Gruss v. Zwirn, No.

09 CV 6441, 2013 WL 3481350, at *13 (S.D.N.Y. Jul. 10, 2013) (work product protection associated with factual portions of attorney interview notes and summaries forfeited upon disclosure of SEC presentation based on such work product). For substantially the reasons set forth above, J.P. Morgan waived any work protect protection that it might have had with respect to those portions of any work product embodying, or constituting factual notes or summaries of Defendant's communications that were disclosed to FINRA.

The motion to compel is therefore granted to the extent that:

1) Hickey is directed to testify as to communications by Defendant that were quoted, described, or summarized in her telephone conversation and correspondence with FINRA; and

2) J.P. Morgan is directed to produce, by **3:00 p.m. on Monday July 25, 2016**, those portions of any documents or records in its possession, custody, or control that embody, contain, or otherwise document the communications by Defendant that J.P. Morgan reported to FINRA in the referenced telephone conversations and correspondence.

The motion is denied in all other respects. The Court will consider in camera submissions to the extent necessary to resolve any dispute as to the propriety or extent of redactions made by J.P. Morgan in materials produced pursuant to this Memorandum Order.

This Order resolves docket entry number 114.

SO ORDERED.

Dated: New York, New York
July 22, 2016

_ /s/ Laura Taylor Swain_ _
LAURA TAYLOR SWAIN
United States District Judge